



CALIFORNIA DEPARTMENT OF FISH AND GAME
South Coast Region
4949 Viewridge Avenue
San Diego, California 92123

Notification No. 1600-2009-0355-R5

AGREEMENT REGARDING PROPOSED STREAM OR LAKE ALTERATION

THIS AGREEMENT, entered into between the State of California, Department of Fish and Game, hereinafter called the Department, and the State of California, Department of Transportation (Point of Contact: Charles Baker/Kedest Ketsela), District 12, 3337 Michelson Drive, Irvine CA 92612, hereinafter called the Applicant, is as follows:

RECITALS

WHEREAS, pursuant to Section 1602 of California Fish and Game Code, the Applicant, on the 30th day of November, 2009, notified the Department that they intend to divert or obstruct the natural flow of, or change the bed, channel, or bank of, or use material from the streambed(s) of, the following water(s): all water bodies in Orange County, California which are: 1) subject to Section 1602 of California Fish and Game Code, 2) within the right of way or drainage easements of a state route or interstate highway, and 3) which are identified as set forth in this Agreement.

WHEREAS, the Department has determined that such operations may substantially adversely affect those existing fish and wildlife resources within water bodies in Orange County, specifically identified as follows: **Fish:** steelhead (*Oncorhynchus mykiss*); **Amphibians:** Pacific tree frog (*Pseudacris regilla*), arroyo toad (*Bufo californicus*); **Reptiles:** southwestern pond turtle (*Emys [=Clemmys] marmorata pallida*), two-striped garter snake (*Thamnophis hammondi*), common kingsnake (*Lampropeltis getula*), gopher snake (*Pituophis catenifer*); **Birds:** great egret (*Ardea alba*), snowy egret (*Egretta thula*), green heron (*Butorides virescens*), mallard (*Anas platyrhynchos*), black-necked stilt (*Himantopus mexicanus*), killdeer (*Charadrius vociferous*), cliff swallow (*Petrochelidon pyrrhonota*), mourning dove (*Zenaida macroura*), Anna's hummingbird (*Calypte anna*), white-throated swift (*Aeronautes saxatalis saxatalis*), black phoebe (*Sayornis nigricans*), southwestern willow flycatcher (*Empidonax traillii extimus*), least Bell's vireo (*Vireo bellii pusillus*), common yellowthroat (*Geothlypis trichas*), bush tit (*Psaltirparus minimus*), wrentit (*Chamaea fasciata*), lesser goldfinch (*Carduelis psaltria hesperophilus*); **Mammals:** coyote (*Canis latrans*), raccoon (*Procyon lotor*), mountain lion (*Puma concolor*), bobcat (*Lynx rufus*), mule deer (*Odocoileus hemionus*); and all other aquatic and wildlife resources, including the riparian vegetation which provides habitat for those species.

THEREFORE, the Department hereby proposes measures to protect fish and wildlife resources during the Applicant's work. The Applicant hereby agrees to accept the following measures/conditions as part of the proposed work.

If the Applicant's work changes from that stated in the notification specified above, this Agreement is no longer valid and a new notification shall be submitted to the Department of Fish and Game. Failure to comply with the provisions of this Agreement and with other pertinent code sections, including but not limited to Fish and Game Code Sections 5650, 5652, 5901, 5931, 5937, and 5948, may result in prosecution.

Nothing in this Agreement authorizes the Applicant to trespass on any land or property, nor does it relieve the Applicant of responsibility for compliance with applicable federal, state, or local laws or ordinances. A consummated Agreement does not constitute Department of Fish and Game endorsement of the proposed operation, or assure the Department's concurrence with permits required from other agencies.

Term and Effective Date

This Agreement becomes effective the date of Department's signature and terminates December 31, 2014 for project construction only. This Agreement shall remain in effect for that time necessary to satisfy the terms/conditions of this Agreement.

Extensions

Pursuant to Section 1600 *et seq.*, the Applicant may request one extension of this Agreement; the Applicant shall request extension of the Agreement prior to its termination. The one extension may be granted for up to five years from the date of termination of the Agreement and is subject to Department approval. The extension request and fees shall be submitted to the Department's South Coast Region at the above address. If the Applicant fails to request the extension prior to the Agreement's termination, then the Applicant shall submit a new notification with fees and required information to the Department. Any construction/impacts that occur under an expired Agreement are a violation of Fish and Game Code 1600 *et seq.*

Suspension and Revocation

The Department reserves the right to cancel this Agreement, after giving notice to the Applicant, if the Department determines that the Applicant has breached any of the terms or conditions of the Agreement.

The Department reserves the right to suspend or cancel this Agreement for other reasons, including but not limited to the following:

- a) The Department determines that the information provided by the Applicant in support of the Notification/Agreement is incomplete or inaccurate;
- b) The Department obtains new information that was not known to it in preparing the terms and conditions of the Agreement;
- c) The project or project activities as described in the Notification/Agreement have changed;
- d) The conditions affecting fish and wildlife resources change or the Department determines that project activities will result in a substantial adverse effect on the environment.

Before any suspension or cancellation of the Agreement, the Department will notify the Applicant in writing of the circumstances which the Department believes warrant suspension or cancellation. The Applicant will have seven (7) working days from the date of receipt of this notification to respond in writing to the circumstances described in the Department's notification. During the seven (7) day response period, the Applicant shall immediately cease any project activities which the Department specified in its notification. The Applicant shall not continue the specified activities until that time when the Department notifies the Applicant in writing that adequate methods and/or measures have been identified and agreed upon to mitigate or eliminate the significant adverse effect.

Amendment

This Agreement may be amended at any time by mutual agreement of the parties. Any amendments to this Agreement shall be made in a separate writing, signed by the parties, and attached to this Agreement. Any approved amendments shall become part of this Agreement.

Liability

The Applicant agrees that it shall be responsible for any violations of this Agreement, whether committed by the Applicant or any person acting on behalf of the Applicant, including its agents, officers, and employees, representatives, or contractors and subcontractors. This Agreement does not constitute the Department's endorsement of the authorized Project Activity.

It is understood the Department has entered into this Agreement for purposes of establishing protective features for fish and wildlife. The decision to proceed with the project is the sole responsibility of the Applicant, and is not required by this Agreement. It is further agreed that all liability and/or incurred cost related to or arising from the Applicant's project and the implementation of the fish and wildlife protective conditions of this Agreement remain the sole responsibility of the Applicant. The Applicant agrees to hold harmless the State of California and the Department against any related claim made by any party or parties for personal injury or any other damages.

Enforcement

The Department reserves the right to enter the project site at any time to ensure compliance with the terms/conditions of this Agreement.

Project Location

The project location includes streams which are subject to Section 1602 of California Fish and Game Code, and that are within the right of way or drainage easements of a state route or interstate highway, in Orange County. The streams and activities covered by this Agreement are restricted to those identified in the Project Description.

Project Description

The project consists of routine maintenance activities as described below under the headings: Purpose, Definitions, and Authorized Activities. The project as described herein constitutes the entire agreement and understanding between the Department and Applicant for routine maintenance activities, and supersedes all prior and contemporaneous routine maintenance activity agreements, representations, or understandings, if any, whether oral or written.

Purpose:

The purpose of this Agreement is to protect fish and wildlife resources pursuant to California Department of Fish and Game Code (Code) 1600 *et seq.* while allowing the Applicant, or their authorized contractor, to perform routine maintenance activities in channels within the right of way (ROW) or drainage easement, of a state route or interstate highway, in order to maintain their function and capacity to prevent flooding that could damage the roadway or adjacent properties, or cause a safety hazard. Those portions of roadway drainage systems that capture water from the pavement through an inlet structure, such as those listed on the Highway System Inventory (July 1995) as drop or curb inlets (C610), overside drains (C611), horizontal drains (C720) and slotted drains or pavement structural drains (C721), and convey it via an enclosed pipe to an outlet are not regulated under this section of the Code and therefore are not covered by this Agreement.

Culverts (which are also listed in the Inventory as C611) are subject to Code Section 1602 if they are connected to an open channel at both ends. Channels that are open on the top, beginning at the outlet

of the enclosed systems described in the paragraph above, have the potential to support a fish or wildlife resource and are also subject to Code Section 1602. Channels that fit these descriptions are addressed in this Agreement. This includes channels and ditches, as defined in the Inventory, that are within the ROW or drainage easements, and also rivers, streams, or other watercourses that are crossed by roadways via bridges or culverts. Routine maintenance activities that are typically performed in these channels include the removal of sand, silt, sediment, debris, rubbish, woody and herbaceous vegetation and other obstructions to flow, the control of weeds, grasses, and emergent vegetation, and the repair and/or replacement in kind, cleaning and clearing, all as necessary to maintain the structural integrity and capacity of these facilities for drainage, flood control, and conservation purposes. This Agreement is not intended to cover: 1) any activities, including routine maintenance, in any riparian habitat that supports sensitive or listed species; 2) activities that remove more than minimal native riparian vegetation or would typically require compensation/mitigation under Section 1600 *et seq.* of the Code, the California Environmental Quality Act (CEQA), or any other environmental laws or regulations; or 3) activities that would involve more than routine maintenance. This Agreement does not relieve the Applicant of any responsibility for compliance with this or any other section of the Code. Notification pursuant to Section 1600 *et seq.* will still be required for all activities that are not specifically authorized by this Agreement. In addition, this Agreement is only applicable to activities that are exempt from CEQA pursuant to either a Statutory or Categorical Exemption.

Definitions:

Improved channel is defined as the channel of a stream or river, watercourse or ditch, in which significant man-made alterations have occurred to improve the passage of irrigation and/or flood flows, including straightening the channel or containing the flows within constructed banks that are concrete-lined or rip-rapped, or earth channels with modified banks.

Unimproved channel is defined as the channel of a stream or river, watercourse or ditch, in which significant manmade alterations and/or improvements have not occurred.

Sparse native vegetation is defined relative to the percent cover value of the majority of the vegetation within the channel at the proposed work site. In order to be considered sparse, no more than 20% of the total vegetation cover within the channel can be native. For example: If the total vegetation cover (both native and non-native) within the channel at the proposed work site is 60% (40% is unvegetated) then native vegetation could occupy no more than 12% of the area in order to qualify as sparse.

Category 1A includes improved channels with little or no vegetation that are concrete lined and located in urban areas. Category 1 channels include those areas of rock placed as energy dissipaters. If vegetation is present, it cannot exceed the following:

- herbaceous ruderal and non-native species including, but not limited to, castor bean, Arundo/giant reed, cocklebur and grasses
- native emergent aquatic vegetation such as cattail up to 400 sq.ft. in area
- a single tree (native or non-native) up to 4" dbh (diameter breast height)

Channels in this category shall not include established native vegetation, such as mulefat (*Baccharis salicifolia*) and willows (*Salix* spp.), nor contain riparian habitat potentially, or known to be historically or presently, occupied by sensitive wildlife species. This category is further limited as follows:

- all channels in this category shall be in areas that have been developed or are in active agriculture
- channels otherwise fitting this description that are adjacent to native habitats or non-native grasslands that could support sensitive species are excluded from this category

- channels otherwise fitting this description that function as wildlife corridors are excluded from this category
- channels otherwise fitting this description, that convey flow that is at least in part from a natural watercourse and therefore may support fish or wildlife resources, are excluded from this category. This exclusion also applies to culverts that convey water that is at least in part from a natural watercourse that supports a fish or wildlife resource.

Category 1B includes improved channels that are in all respects as defined under Category 1A, except they are unlined or lined with rip-rap.

Category 2 includes improved and unimproved channels that are vegetated with any of the following:

- herbaceous and woody non-natives including, but not limited to, castor bean, Arundo/giant reed, cocklebur, grasses, acacia, eucalyptus and palms
- herbaceous and woody native riparian vegetation

This category also includes improved channels that would otherwise fit in category 1, but are adjacent to habitats that may support sensitive species (all undeveloped/rural areas), channels that function as wildlife corridors, and culverts that convey, at least in part, flow from a natural watercourse that may support a fish or wildlife resource. Areas that support sensitive species are excluded from this category.

Category 3 includes improved and unimproved channels that support native riparian vegetation that is habitat for species that are sensitive (those included in the California Natural Diversity Database), or listed as threatened or endangered pursuant to the California Endangered Species Act or the Federal Endangered Species Act. Routine maintenance activities in this category shall be subject to separate notification and agreement pursuant to Fish and Game Code 1600 *et seq.*

Prior approval: The Applicant's Maintenance Division will submit a written request (Appendix A) to the District Biologist, Environmental Planning Branch, containing the location and dimension of the channel, volume of soil and vegetation to be removed, and site photographs. The District Biologist will evaluate the site for potential impacts to fish and wildlife resources, particularly those considered sensitive, and shall determine if the activity is in Category 2 or 3. If the activity is in Category 2, additional limitations or conditions on the proposed work will be imposed by the District Biologist, if needed to protect those resources. For each request, the District Biologist will add (or attach) to the request form: a brief description of the biological resources present at the site prior to the maintenance activity, the rationale for the determination of the category, and any additional limitations or conditions imposed on the work. If the activity is in Category 3, the activity is not authorized by this Agreement and notification pursuant to Section 1602 of the Fish and Game Code will be required.

- Authorized activities in Category 1A and 1B do not require prior approval from the District Biologist.
- Authorized activities in Category 2 require prior approval from the District Biologist.

Authorized Activities:

The routine maintenance activities identified below, when performed on Category 1 and 2 channels in accordance with the definitions and procedures described in this Agreement, shall not require further notice to, nor agreement with, the Department.

1. Channels may be cleared of sediment, all human generated debris such as lawn and farm cuttings, garbage and trash, flood-deposited vegetation, fallen trees, dead trees which are in danger of falling

into the channel, branches, and other debris, which directly interfere with the proper function and operation of the channel and associated devices such as sediment traps, energy dissipaters, culverts, weirs, and stream flow control and measuring stations, or that which must be removed to repair those devices or replace them, in kind, in their existing locations.

2. Where vegetated watercourses cause a line-of-sight problem for signage or driveways/roadways entering state routes and interstate highways, that vegetation may be pruned/trimmed to the point where the obstructed view has been relieved.

3. Vegetation that would cause an obstruction to flow may be removed as follows:

Category 1A channels may be cleared of all vegetation.

Category 1B channels may be cleared of vegetation only as required to maintain the function of the channel as designed and only if the clearing will not result in erosion that could adversely affect fish or wildlife resources downstream. Mowing and/or trimming of vegetation in this channel type shall be the preferred maintenance activity, whenever possible, in order to maintain soil stability.

Category 2 channels may be cleared of any non-native vegetation. Native vegetation may be removed only if it is 1) sparse, as previously defined, 2) the removal is necessary to perform activities as described in #1, and 3) the maintenance activity is necessary to prevent flooding. Mowing and/or trimming of vegetation in unlined channels in this category shall be used instead of clearing, whenever possible, in order to maintain soil stability. Removal of native vegetation, by any means, that does not fit the definition of sparse is not authorized by this Agreement.

Except as otherwise permitted in this agreement, the removal of soil, vegetation, and vegetative debris from the streambed or stream banks is prohibited.

CONDITIONS

The following provisions constitute the limit of activities agreed to and resolved by this Agreement. The signing of this Agreement does not imply that the Applicant is precluded from doing other activities at the site. However, activities not specifically agreed to and resolved by this Agreement shall be subject to separate notification pursuant to Fish and Game Code Sections 1600 *et seq.*

General

1. The agreed work includes routine maintenance activities associated with the Project Location and Project Description (including the Purpose, Definitions, and Authorized Activities) that are provided above. Specific work activities and mitigation measures are described on/in the notification and attachments submitted by the Applicant; the project shall be implemented as proposed unless directed differently by this agreement.
2. Maintenance activities shall be performed at a time and in a manner to minimize adverse impacts and provide for the protection and continuance of existing fish and wildlife resources. The following measures to protect fish and wildlife resources are mandatory conditions of this Agreement. Additional measures or project limitations may be added at some Category 2 channels by the District Biologist and must be implemented as directed for those activities to be authorized by this Agreement.
3. The Applicant shall provide a copy of this Agreement to all contractors, subcontractors, and project supervisors. The Applicant shall ensure that all project personnel abide by all terms and conditions of this agreement. A copy of the Agreement shall be readily available at work sites at all times during periods of active work and must be presented to any Department personnel, or personnel from another agency, upon demand.

4. The Applicant's Maintenance Division shall submit a log of all maintenance activities covered by this Agreement, with pre-project photographs, the location of the activity, and a description of the work, to the District Biologist on a monthly basis. The District Biologist shall review these logs to ensure that all activities were conducted in accordance with the terms of this Agreement. The log shall be retained by the Applicant for the duration of this Agreement, plus an additional three years after it expires, in a location that is accessible and known to the Department, and shall be available for review at any time during normal business hours.

Impacts and Compensatory Mitigation

5. Disturbance or removal of vegetation shall not exceed the limits approved by the Department. The Applicant shall mitigate at a minimum 5:1 ratio for impacts beyond those authorized in this Agreement. In the event that mitigation is required, the type and location of mitigation must be approved by the Department.

6. If any sensitive species are observed in the project vicinity, the Applicant shall submit a California Native Species Field Survey Form and survey map to the Natural Diversity Database (NDDDB) within ten working days of the sightings. The form and instructions for completing the form are available on-line at <http://www.dfg.ca.gov/biogeodata/cnddb/>. The form and survey map shall be sent to the Department of Fish and Game, California Natural Diversity Database, 1807 13th Street, Suite 202, Sacramento, CA 95814, with copies sent to the Department's South Coast Office at the address above, ATTN: Streambed Alteration Program – SAA #1600-2009-0355-R5.

Resource Protection

7. All work within channels that have only intermittent flow shall be performed while the channel is dry. Work within channels with perennial flow shall be performed during times when there is relatively low flow.

8. The Applicant shall not remove vegetation from February 15 to August 15 to avoid impacts to nesting birds. Vegetation may be removed during this time if a qualified biologist conducts a survey for nesting birds within one week of the vegetation removal, and ensures no nesting birds could be impacted by the activity. If nesting birds are present, no work shall occur until the young have fledged and will no longer be impacted by the project.

9. Any exotic plant species that are removed shall be disposed of at a site approved by the District Biologist. The Department recommends the removal of exotic plant species from as many channels and streams as possible as long as this can be accomplished in a manner that does not harm existing fish and wildlife resources.

10. The Applicant shall not disturb vegetation on the stream banks during maintenance operations, except the absolute minimum needed to allow access of equipment and personnel to the area. These impacts shall be reduced to the greatest extent possible, and no native trees shall be impacted by this activity.

11. Material removed from the channels shall not exceed the limits approved by the Department.

12. Any materials used for erosion control measures during or after construction, within or adjacent to the stream or riparian habitats, shall consist only of materials that are free from toxic chemicals, are biodegradable, and cannot ensnare fish or wildlife.

13. This Agreement does not authorize take, incidental or otherwise, of any protected species. For the purpose of this Agreement, "protected species" means the following: a species fully protected under state law, a species listed under the California Endangered Species Act (Fish & Game Code § 2050 *et seq.*) and/or Federal Endangered Species Act (16 U.S.C. § 1531 *et seq.*), or any other species for which take is prohibited under state or federal law.

Equipment and Access

14. Access to the work site shall be via existing roads and access ramps, when available.
15. Staging/storage areas for equipment and materials shall be located outside of the stream/lake.
16. Any equipment or vehicles driven and/or operated within or adjacent to the channels, streams or lakes shall be checked and maintained daily to prevent leaks of materials that if introduced into water could be harmful to aquatic life.
17. No equipment maintenance shall be performed within or near any stream, channel or lake margin where petroleum products or other pollutants from the equipment may enter these areas under any flow.
18. Stationary equipment such as cranes, motors, pumps, generators, and welders, etc. which are located within or adjacent to the stream or riparian/wetland habitats shall be positioned over drip pans, or other appropriate means, to contain any toxic materials that may drip or spill from such equipment.

Pollution, Sedimentation, and Litter

19. All project and project related activities shall be conducted in a manner that will not adversely affect water quality within any stream, or stream or riparian habitats.
20. Material removed from the channels shall not be placed where it can be washed back into a stream/lake, or where it will cover aquatic or riparian vegetation.
21. Water containing mud, silt or other pollutants from routine maintenance activities conducted by the Applicant shall not be allowed to enter a lake or flowing stream, be placed in locations that may be subjected to high stream flows, or where it may be washed by rainfall or runoff into waters of the State. Measures to minimize turbidity/siltation shall be taken into account during project planning and implementation.
22. No debris, soil, sand, bark, slash, sawdust, rubbish, cement or concrete washings thereof, asphalt, paint, oil or petroleum products, or any other material that may be harmful to fish or wildlife, that results from any maintenance or associated activity of whatever nature that is conducted by the Applicant or their contractor(s), shall be allowed to contaminate the soil, or enter or be placed where it may be washed by rainfall or runoff into the waters of the State. When work is completed, any excess materials or debris shall be removed from the work area.
23. The Applicant shall comply with all litter and pollution laws. All contractors, subcontractors, and employees shall also obey these laws and it shall be the responsibility of the Applicant to ensure compliance.
24. Equipment shall not be operated in ponded or flowing areas. When work in a flowing stream or ponded area is unavoidable, measures to minimize turbidity/siltation shall be implemented.

25. If a stream's low flow channel, bed or banks/lake bed or banks have been altered, these shall be returned as nearly as possible to their original configuration and width, without creating future erosion problems.

26. Silty/turbid water shall not be discharged into the stream/lake. Erosion/silt control measures shall be utilized throughout all phases of operation where silt laden water from exposed slopes or disturbed areas could enter waters of the state. Any silt settling basins shall be located away from the stream to prevent discolored, silt-bearing water from reaching the stream during any flow level. Erosion control measures shall be monitored during and after each storm event. Modification, repairs, and improvement to erosion control measures shall be made as needed to maintain function. Upon Department determination that turbidity/siltation levels resulting from project related activities constitute a threat to aquatic life, activities associated with the turbidity/siltation shall be halted until effective Department-approved control devices are installed and any abatement procedures have been completed.

Reporting Requirements

27. The Applicant shall provide a written report, including a brief description of the activities conducted and a complete list of each location/facility where routine maintenance was performed during the previous year, (January 1 through December 31), to the Department on or before February 28 of each year. The Applicant shall include the associated fee total for all activities completed under Category 2. The report shall be sent to the Department's South Coast Office at the address above, ATTN: Streambed Alteration Program – SAA #1600-2009-0355-R5.

CONCURRENCE

CALIFORNIA DEPARTMENT OF TRANSPORTATION

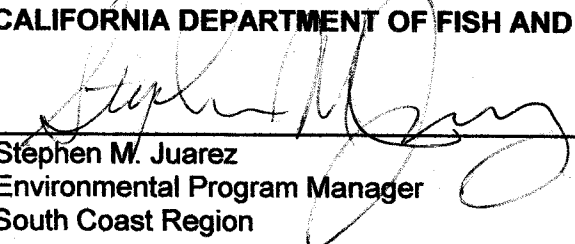

Name (signature)

Date: 12/30/09

ARMAND SILVA
Name (printed)

MAINTENANCE MANAGER II
Title

CALIFORNIA DEPARTMENT OF FISH AND GAME


Stephen M. Juarez
Environmental Program Manager
South Coast Region

Date: 13 Jan 2010

APPENDIX A:

MAINTENANCE REQUEST FORM TO ENVIRONMENTAL PLANNING

Date of Request: _____

Sent By (Supervisor/Superintendent) : _____ / _____

Project Description Information: (please use one form for each site)

Route: _____ **Post Mile:** _____ **Direction of Travel:** _____

Type of facility/structure: _____

Specific Post Miles of Drain/Ditch/Channel: _____

Length: _____ **Width:** _____ **Height:** _____

Amount (cy) of soil and/or vegetation requested for removal:

Type of Equipment necessary & approximate size of staging area to complete activity (if applicable):

Additional Project Comments: _____

Attach Photos: (please label each photo w/ site information & date picture taken)